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11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 IN THE MATTER OF THE SEIZURE OF:

No. CV 18-06742-RGK (MAAx)

15 ANY AND ALL FUNDS HELD IN
16 REPUBLIC BANK OF ARIZONA
ACCOUNTS XXXX1889; XXXX2592,
17 XXXX1938, XXXX2912, AND
18 XXXX2500.

PLAINTIFF'S EX PARTE APPLICATION
FOR PARTIAL STAY
AND PROPOSED ORDER

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22 Plaintiff United States of America (the "government"), by and
23 through its counsel of record, the United States Attorney for the
24 Central District of California and Assistant United States Attorney
25 John J. Kucera, hereby applies for an order staying the briefing
26 schedule for claimant James Larkin's (the "claimant") Motion to
27 Access and Use Purportedly Inadvertently Produced Materials (the
28 "Motion").

1 **I. Introduction**

2 On March 28, 2018, and on July 25, 2018, in the District of
3 Arizona, the government filed an indictment and a first superseding
4 indictment, respectively, with a trial date presently set for January
5 15, 2020, see *United States v. Lacey, et al.*, CR-18-00422-SPL (the
6 "criminal matter"). The indictment and first superseding indictment
7 included forfeiture allegations that seek, among other things, all of
8 the assets seized pursuant to seizure warrants issued in this
9 District, including the assets identified in the above-captioned
10 matter (the "defendant assets"). On October 5, 9, 10, and 11, 2018,
11 the government filed civil forfeiture complaints seeking to forfeit
12 almost the exact same assets,¹ and the government has filed Notices
13 of Related Cases in order to alert the Court to this pending civil
14 action.²

15 On September 20, 2018, claimant applied to this Court seeking an
16 order to grant claimant access and use of inadvertently disclosed
17 materials (Dkt. #59 in this matter) produced pursuant to the May 2,
18 2018, Case Scheduling Order entered in the Arizona criminal matter
19 (Dkt. # 131 in the Arizona criminal matter), including grand jury and
20 other investigative materials protected by the work-product doctrine,
21 Fed.R.Crim.P. 16(a)(2), Fed.R.Crim.P.6(e), and/or other applicable
22 privileges and protections.

23 As explained below, moving forward with claimant's Motion and,
24 indeed, providing any civil discovery at all, would allow claimant to

25 ¹ The civil forfeiture actions are *in rem*, and as such, they do
26 not seek any money judgments from the defendants in the criminal
27 actions.

28 ² For procedural reasons, the government has identified
anticipated claimants related to the assets sought by the complaints,
and the government has filed the complaints in such a way to group
the assets based on those anticipated claimants.

1 access and use otherwise impermissible and protected materials. Such
2 access and use would inevitably concern the government's strategy and
3 processes (both civilly and criminally) and would likely have an
4 adverse effect on the Arizona criminal matter. Such outcomes are not
5 permitted under 18 U.S.C. § 981(g)(1). Therefore, this case should
6 be stayed.

7 **II. The Government Cannot Fully Oppose the Claimant's Motion**
8 **Without Divulging Its Thought Processes and Legal Strategy in**
9 **Connection with the Arizona Criminal Matter**

10 For the government to fully and fairly oppose claimant's Motion,
11 the government would need to explain its position as to why the
12 documents in dispute should be withheld. To fully and fairly oppose
13 claimant's Motion, the government would need to walk through and
14 explain what inferences to draw (or not to draw) with respect to the
15 disputed materials in question. By providing such an explanation,
16 the government risks disclosing its thought processes and legal
17 strategy in the ongoing criminal matter.

18 In addition, discussing the import of these materials would give
19 claimant and his co-conspirators in the pending criminal matter
20 impermissible insight into the government's thought processes and
21 strategy with respect to that matter. This is because the inferences
22 that the government would ask the Court to draw in determining the
23 status of the disputed materials would be the same inferences that
24 the government has itself drawn in building a foundation and
25 structuring and pursuing the related criminal matter. These concerns
26 are especially acute in the instant case given that claimant's Motion
27 relies on facts and documents outside the pleadings, and consists of
28 what the government contends to be impermissible evidence, protected
by the work-product doctrine, Fed. R. Crim. P. 16(a)(2), Fed. R.

1 Crim. P. 6(e) and/or other applicable privileges and protections.

2 Section 981(g)(1) requires a stay of "the civil forfeiture
3 proceeding" if the court determines that civil discovery will
4 adversely affect a related criminal investigation or case. 18 U.S.C.
5 § 981(g)(1). "The civil forfeiture proceeding" refers to the entire
6 civil forfeiture case.

7 To prevent disclosure of the government's thought process and
8 strategy for the criminal investigation, information to which
9 claimant is not entitled at this time, the case should be stayed.
10 Furthermore, should this Court stay the pending civil cases, the
11 defendants in the criminal matters (including James Larkin, the
12 claimant here) are free to address the exact same discovery issues in
13 that forum.

14 Finally, as a matter of equity, because the defendant assets
15 sought to be forfeited in the recently filed civil cases are
16 essentially the same assets sought in the criminal matter, any
17 disclosures made in the civil discovery process would be detrimental
18 to the government's ability to effectively prosecute the criminal
19 matter. Such an outcome is both inherently unfair and prejudicial to
20 the government.

21 **III. There Is No Prejudice Resulting From a Stay**

22 Claimant will not suffer any prejudice as a result of a stay.
23 Indeed, claimant's Motion concerns materials produced in accordance
24 with the Case Scheduling Order in the Arizona criminal matter and,
25 therefore, is more properly resolved in that forum. Claimant's (and
26 other potential claimants') only other pending motion in this civil
27 matter is one for return of property (see, Motion to Vacate or Modify
28

1 Seizure Warrants, Dkt. #6),³ but defendants (including claimant) may
2 pursue a similar remedy in the Arizona criminal matter (see, e.g.,
3 *United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993);
4 *United States v. Swenson*, 2013 WL 3322632 (D. Idaho July 1, 2013)).
5 Thus, while the civil claims to the various properties will remain
6 uncertain for a longer period of time, this is a problem inherent in
7 any stay of a forfeiture proceeding, and does not particularly
8 prejudice any claimant here, especially since the trial is set in the
9 criminal matter, and claimants/defendants have a forum there to bring
10 any appropriate motions.

11 **IV. Conclusion**

12 For the foregoing reasons, pending the outcome of the
13 government's related criminal proceeding, which is presently set for
14 trial on January 15, 2020, the government respectfully requests that
15 this forfeiture action shall be stayed for all purposes, except for
16 the timely filing of claims and answers to the civil complaints. A
17 Proposed Order is being lodged contemporaneously with this
18 application.

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27 ³ Notwithstanding any grant of a stay by this Court, "a [motion
28 for return of property] is properly denied once a civil forfeiture
action has been filed." *In Re Return of Seized Prop. (Jordan)*, 625
F.Supp 2d 949, 955 (C.D. Cal. 2009) (citing *United States v.*
\$83,310.78, 851 F.2d 123, 1235 (9th Cir. 1988)).

1 This application is based upon the files and records in this
2 case and the declaration of John J. Kucera and such further evidence
3 and argument as the Court may permit.

4 On October 11, AUSA John Kucera advised counsel for claimants
5 that the government intended to bring this application. Mr. Thomas
6 Bienert, counsel for Mr. Larkin, and Mr. Paul Cambria, counsel for
7 Mr. Lacey, advised that they intended to oppose the application.

8 Dated: October 12, 2018

Respectfully submitted,

9 NICOLA T. HANNA
10 United States Attorney

11 LAWRENCE S. MIDDLETON
12 Assistant United States Attorney
 Chief, Criminal Division

13 /s/John J. Kucera
14 JOHN J. KUCERA
15 Assistant United States Attorney

16 Attorneys for Plaintiff
17 UNITED STATES OF AMERICA
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